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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 IN RE: TFT-LCD (FLAT PANEL)
13 ANTITRUST LITIGATION
14
15

No. 3:07-md-1827-SI

MDL No. 1827

16 *Best Buy Co., Inc., et al. v. AU Optronics Corp.,*
17 *et al.*, No. 10-cv-4572 SI

18 *Best Buy, et al. v. Toshiba, et al.*,
19 No. 12-cv-4114 SI
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**DEFENDANTS' OBJECTION TO BEST
BUY REBUTTAL ARGUMENT
CONCERNING DOWNSTREAM PASS
ON AND REQUEST FOR
INSTRUCTION**

Judge: Hon. Susan Illston

1 During his rebuttal closing argument on August 29, 2013, Mr. Silberfeld suggested to the
 2 jury that, based on the Court's instructions, average downstream pass on rates are not legally
 3 sufficient. Mr. Silberfeld made the following comments:

4 Mr. Freitas criticized Dr. Frankel. Criticized Dr. Frankel for not
 5 doing an average downstream pass-on analysis. And what I would
 6 ask you to look at, because words matter, is the difference between
 7 the two instructions that you will have about damages.

8 So, for the federal claim, which is called Federal Damages - No
 9 Pass-On instruction, or No Pass-On Consideration, the instruction
 10 says you can use an average to find an overcharge.

11 When you get to the state pass-on instruction that I read to you
 12 earlier about the Defendants having the burden of proof, you will
 13 not see the word "average" anywhere. And there's a reason for that.
 14 Averages don't give you, in the retail setting, a useable answer.
 15 And that's the essence of Dr. Frankel's testimony, to which Dr.
 16 Snyder grudgingly agreed.

17 Trial Tr. 3503:1-15. While the argument is not entirely coherent, and is utterly false to the extent
 18 it suggests that Dean Snyder "agreed" that there is anything that is not "usable" about an average
 19 downstream pass on analysis, there is a problem that goes beyond simple factual inaccuracy. Mr.
 20 Silberfeld's argument improperly suggests that, as a legal matter, an average downstream pass on
 21 calculation is not "usable."

22 There is no basis in the law for this suggestion, and no other reason to call the jury's
 23 attention to a wording difference in the Court's instructions. Defendants seek a corrective
 24 instruction to address the misimpression that might have been caused by Mr. Silberfeld's
 25 comments. Defendants request that the jury be instructed before further deliberations that an
 26 average provides a legally sufficient basis for a pass on calculation if supported by the evidence.

27 Dated: September 3, 2013

FREITAS TSENG & KAUFMAN LLP

/s/ Jason S. Angell

Jason S. Angell

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HannStar Display Corporation

1 Dated: September 3, 2013

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